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Corporation of the Tridentine Latin Rite Catholic Church of Saint Joseph, a Washington corporation v. FRANCIS SCHUCKARDT; MICHAEL MANGOLD a/k/a FRA. PHILLIP MARIE; GABRIEL GORBET a/k/a BRO. ISAAC JACQUES MARIE; VLADIMIAR BORIDIN a/k/a BRO. LONGIUNS; COURTNEY KRIER a/k/a FRA. MATTHEW MARIE; RAYMOND KOSCH a/k/a FRA. CLEMENT MARIE; ANDREW JACOBS a/k/a BRO. MARY FIDELIS; TERRY HORWATH a/k/a BRO. MARY MATHIAS; JOSEPH BELZAK a/k/a BRO. JOHN FRANCIS MARIE; and OUR

LADY OF MARIENFRIED CATHOLIC CHURCH, a d/b/a of ANDREW JACOBS a/k/a BRO. MARY FIDELIS, and TERRY HORWATH, a/k/a BROTHER MARY MATHIAS : Appellant's Reply and Cross- Respondent's Brief

Utah Court of Appeals

John T. Anderson; Parsons, Behle & Latimer; attorneys for appellant and cross-respondent.
Robert L. Lord; attorney for respondents and cross-appellants.

IN THE UTAH COURT OF APPEALS

THE CORPORATION OF THE TRIDENTINE LATIN RITE CATHOLIC CHURCH OF SAINT JOSEPH, a Washington corporation, Plaintiff/Appellant/ Cross-Respondent, vs. FRANCIS SCHUCKARDT; MICHAEL MANGOLD a/k/a FRA. PHILLIP MARIE; GABRIEL GORBET a/k/a BRO. ISAAC JACQUES MARIE; VLADIMIAR BORIDIN a/k/a BRO. LONGIUNS; COURTNEY KRIER a/k/a FRA. MATTHEW MARIE; RAYMOND KOSCH a/k/a FRA. CLEMENT MARIE; ANDREW JACOBS a/k/a BRO. MARY FIDELIS; TERRY HORWATH a/k/a BRO. MARY MATHIAS; JOSEPH BELZAK a/k/a BRO. JOHN FRANCIS MARIE; and OUR LADY OF MARIENFRIED CATHOLIC CHURCH, a d/b/a of ANDREW JACOBS a/k/a BRO. MARY FIDELIS, and TERRY HORWATH, a/k/a BROTHER MARY MATHIAS, Defendants/Respondents/ Cross-Appellants.	APPELLANT'S REPLY AND CROSS-RESPONDENT'S BRIEF Court of Appeals No. 880542-CA

Appeal from a Judgment of the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Frank G. Noel, Judge

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STATEMENT OF FACTS

Appellant and cross-respondent, Corporation of the Tridentine Latin Rite Catholic Church of Saint Joseph (the "Church") agrees with much of respondents' statement of facts. However, that statement must be clarified and supplemented in two important respects.

First, by selectively extracting certain portions of the testimony of Deputy Charles Ellis ("Deputy Ellis"), respondents attempt to give the impression that at the time he effected personal service of the summons and complaint, Deputy Ellis had no idea who he was serving. (Respondents' Brief at 7-8). That assertion is, however, belied by a full and fair reading of Deputy Ellis' testimony and that of the two individuals who physically witnessed his service of process. That testimony makes clear that as Deputy Ellis and the two witnesses moved up the driveway towards the front door of the Priory, they were observed by a member of the Schuckardt Group who was immediately and spontaneously identified by the two Church members as respondent Horwath (Tr. 97, 98, 180, 181, 188, 189). It further reflects that Deputy Ellis identified himself to Horwath as a police officer, announced his intent to serve the summons and complaint and attempted to explain their contents. (Tr. 97, 98, 180, 181).

Respondents, however, seek to invalidate Deputy Ellis service of process by asserting the unremarkable fact that four

years after he effected service, Deputy Ellis " . . . could not describe Terry Horwath." (Respondents' Brief at 7). Respondents then claim that Deputy Ellis " . . . acknowledged that Mr. Horwath could have been any one of the people in the group and he had no knowledge of which one was Horwath." Id. at 8. That assertion, however, completely ignores the unchallenged testimony of Deputy Ellis during his redirect examination. That testimony is as follows:

> Q. (By Mr. Anderson, legal counsel for the Church) Deputy Ellis, you indicated that apparently there was more than one individual standing behind the door [of the Priory], correct?
>
> A. They were in the doorway. The door was open and they were standing in the foyer, I guess you would call it.
>
> Q. And I believe you indicated in response to Mr. Lord's question, that Mr. Horwath could have been any one of those individuals; is that correct?
>
> A. Yes.
>
> Q. But were you relying on what Father Pivarunas [one of the two witnesses observing the service of process] told you as to who Mr. Horwath was?
>
> A. Yes.
>
> Q. And is that basis upon which you believe you served the papers on Mr. Horwath?
>
> A. Yes.
>
> Q. And that's so reflected in your return of service?
>
> A. Yes.

(Tr. 111-12). Thus, there is little or no factual support for respondents' oblique suggestion that personal service was effected on any one other than respondent Horwath.

Next, respondents attempt to create the impression that Deputy Ellis never informed anyone at the Priory " . . . that he had a summons or complaint, what the nature of the 'civil papers' were, or attempt to hand them to anyone at the door." (Respondent's Brief at 8). To support that remarkable assertion, respondents cite pages 99 and 123 of the trial transcript. Id. However, a careful review of those pages establishes that respondents' reliance on page 99 completely ignores Deputy Ellis' testimony on pages 97 and 98 in which he explicitly stated that he informed those in attendance at the Priory that he was " . . . there for the purpose of serving civil papers." (Tr. 98). Moreover, respondents' reliance on page 123 of the transcript is disingenuous in that it reflects only the testimony of one of the individuals at the door of the Priory (respondent Krier) who testified that Deputy Ellis never told him " . . . what the papers were." Respondents can cite nothing in the transcript to support their claim that Deputy Ellis never informed Horwath of the substance of the papers that he attempted to serve. Indeed, it would be impossible for respondents to do so in light of their inexplicable failure to assure the attendance of Horwath as a witness at trial.

SUMMARY OF ARGUMENTS

1. Substituted service of process is permitted under Washington law if it is impractical or impossible to effect personal service. Specifically, Washington law is clear that if a defendant cannot be found or has concealed himself so that process cannot be served on him, substituted service is sufficient to acquire jurisdiction. In this case, the record clearly establishes that respondents Schuckardt, Belzak and Jacobs secretly removed themselves from the Priory to avoid service of process. As such, substituted service by personal service on respondent Horwath is valid.

2. The Church's personal service of process on respondent Horwath complied fully with the requirements of Washington law. Specifically, Washington law does not require that the process server actually physically place the summons and complaint in the defendant's possession; rather, it only requires that the server attempt to yield possession and control of the documents while in a position to accomplish that act. Because Deputy Ellis sought to do just that, respondent Horwath's angry refusal to accept the proffered papers cannot invalidate service of process.

3. In cross appealing from the District Court's refusal to quash service as against respondents Horwath, Gorbet, Krier and Boridin, respondents have failed to discharge their burden of marshalling all of the evidence supporting the court's

factual findings that they were validly served. As such, respondents are precluded from obtaining any relief on their cross-appeal.

4. Under Washington law, an abode once acquired is presumed to continue until the person asserting a change of abode shows through clear and convincing evidence that he has acquired a new and permanent abode. In their brief, respondents have completely failed to show any evidence in the record establishing their acquisition of a new "usual abode" on the date service of process was effected. As such, under Washington law, the Priory is presumed to continue as their usual abode, and substituted service at the Priory was sufficient to confer jurisdiction over them in Washington.

ARGUMENT

I. SUBSTITUTED SERVICE OF PROCESS IS PERMISSIBLE IN ANY SITUATION WHERE IT IS IMPRACTICABLE OR IMPOSSIBLE TO EFFECT PERSONAL SERVICE.

The law is well settled that:

> "[s]ubstituted or constructive service of process, if authorized by statute, may be had where it is impracticable or impossible to get actual personal service. The right to resort to constructive service of process is based on the ground of necessity, and it is limited and restricted to cases where personal service cannot be had on a defendant, either because he is a non-resident or because, being a resident, he has gone out of the state, or cannot be found, or has concealed himself so that process cannot be served on him, and the validity of statues providing therefor is generally held to

> depend on the fact that the defendant, after due diligence, cannot be found in the state.

62 Am. Jur. 2d, Process, Section 66, p. 846 (1972).

The Washington courts have held that the issue of whether or not a defendant has concealed himself so as to evade process is a factual question. Bethel v. Sturmer, 3 Wash. App. 862, 479 P.2d 131, 134 (1970). And, "a clandestine or secret removal from a known address appears necessary for concealment under the statute." Patrick v. DeYoung, 45 Wash. App. 103, 724 P.2d 1064, 1067 (Wash. 1986). The rationale for granting a party relief from another party's concealment is that:

> In concealing himself, the defendant, by his own action, renders personal service of process impossible. This action constitutes a waiver of notice of the proceedings sought to be avoided.
>
> . . .
>
> To allow a person to escape his civil obligations by purposely hiding himself would be to encourage deception.

Clark v. LeBlanc, 92 N.M. 672, 593 P.2d 1075, 1076 (N.M. 1979).

In light of the foregoing principles, it is obvious that substituted service was justified: respondents Schuckardt, Jacobs and Horwath fled from the Priory at which they had resided for years to a motel in downtown Spokane " . . . for the purposes of safety and to avoid any confrontation," Tr. 33, and they purposely concealed from the Church any mention of their move

from the Priory to the motel (Tr. 55, 56). If ever there was a campaign of concealment, this is it.

Moreover, the days preceding the attempt to effect service were punctuated by periodic exchanges of gunfire, verbal taunts and threats between the Schuckardt Group and other members of the Church. (Tr. 24, 32, 35, 36, 55, 56, 66, 69, 72, 75, 85, 90, 91, 101, 113, 128 and 181). In the final analysis, both sides were acutely apprehensive of the threat of physical violence. Id. As such, the process server's apprehension for his own personal safety and that of the Church members accompanying him established a compelling necessity for substituted service -- service calculated to minimize the risk of bloodshed. As such, the substituted service effected by Deputy Ellis suffers from none of the infirmities suggested by respondents.

Finally, there is no support for respondents' assertion that the trial testimony " . . . raises a reasonable suspicion that a deliberate attempt was made not to inform [respondents] that a law suit had been commenced against them." (Respondents' Brief at 17). That assertion is incredible in light of Bishop Schuckardt's own testimony that he " . . . had heard rumors of a complaint" having been filed against the Schuckardt Group, Tr. 41, and that some three weeks after the summonses and complaints were served, Bishop Schuckardt issued a written decree excommunicating one of the Church's members, the grounds for which was "summoning [the Schuckardt Group] before a lay tribunal, to which

there is attached an excommunication latae sententiae specifically reserved to the Holy See." (Trial Ex. P-4).

Therefore, there is no support in the record for respondents' assertion that they were never apprised of the pendency of the Washington action. As such, they can mount no due process objections to the sufficiency of process.

II. THE CHURCH'S PERSONAL SERVICE OF PROCESS ON RESPONDENT HORWATH COMPLIED FULLY WITH THE REQUIREMENTS OF WASHINGTON LAW.

Respondents contend in their brief that Deputy Ellis' personal service of the summons and complaint on respondent Horwath was defective in two respects: (i) that Deputy Ellis " . . . had no idea who he was serving" and (ii) that Deputy Ellis " . . . never actually tendered the [summons and complaint] to anyone." (Respondents Brief at 22-28). Those contentions are without merit.

As demonstrated at pages 2-3, supra, at the time he effected personal service on respondent Horwath, Deputy Ellis was apprised of Horwath's identity and on that basis attempted to physically deliver the summons and complaint as he stood at the door of the Priory. Again, it is crucial to note that at trial, respondents never refuted Deputy Ellis' testimony that he served respondent Horwath on the basis of the contemporaneous identifications made by two members of the Church and that he reasonably believed that service was being effected on Horwath. (Tr. 111,

112). That a process server would typically have no advance knowledge of the actual identity of the person whom he was seeking to serve is hardly surprising; respondents' efforts to attempt to exploit that fact must be rejected.

Next, respondents suggest in their brief that personal service on respondent Horwath was defective in that " . . . at no time did he actually deliver or even tender the papers to anyone." (Respondents' Brief at 26). That assertion, however, completely ignores controlling Washington law that, to be effective, service does not actually require that the defendant physically receive the proffered papers. In the case of United Pacific Insurance Company v. Discount Company, 15 Wash. App. 559, 550 P.2d 699 (1976), the court held that where one of the defendants slammed the door, knocking the process papers from the server's hand, defendants were validly served and the court had jurisdiction over them. The court stated:

> The facts in the case at bench demonstrate a clear attempt by the process server to yield possession and control of the documents to [the defendant] while he was positioned in a manner to accomplish that act. Normal 'delivery' thereof would have been effected upon [the defendant] except for her obvious attempt to evade service by slamming the door after the papers had been held out to her. The summons need not actually be placed in the defendant's hand [for service to be effective].

Id. at 701 (emphasis added).

In the case at bar, personal service on Horwath and substitute service on the remaining parties was made by Deputy Ellis' offering the documents to Horwath and then placing them upon the porch of his residence after Horwath slammed the door. (Tr. 97, 98, 180, 181). In the words of United Pacific, Deputy Ellis clearly attempted to "yield possession and control of the documents to Horwath while he was positioned in a manner to accomplish that act." Horwath's extraordinary effort to evade service of process by physically refusing to accept the proffered papers cannot serve as a basis for invalidating service. Therefore, the district court properly concluded that personal service on Horwath was validly effected in conformity with Washington law.

III. IN ASKING THIS COURT TO REVERSE THE DISTRICT COURT'S REFUSAL TO QUASH SERVICE AS AGAINST RESPONDENTS HORWATH, GORBET, KRIER AND BORIDIN, RESPONDENTS HAVE FAILED TO DISCHARGE THEIR BURDEN OF MARSHALLING ALL EVIDENCE SUPPORTING THAT CONCLUSION AND THE FINDING ON WHICH IT IS BASED. AS SUCH, THEY ARE PRECLUDED FROM OBTAINING ANY RELIEF ON APPEAL.

Fewer principles could be better settled than the proposition that on appellate review the findings of fact and judgment of the trial court are presumed to be valid and correct and the heavy burden of establishing error rests with the appellant. Hal Taylor Associates v. Union America, Inc., 657 P.2d 743, 747, (Utah 1982); Hutcheson v. Gleave, 632 P.2d 815 (Utah 1981). And, upon review, "this court views the evidence and all

the inferences that can reasonably be drawn therefrom in a light most supportive of the trial court's findings. Horton v. Horton, 695 P.2d 102, 106 (Utah 1984).

Unless clearly erroneous, findings of fact will not be set aside, and, if there is a reasonable basis in evidence, the findings will be affirmed on appeal. Utah R. Civ. P. 52(a); Katzenberger v. State, 735 P.2d 405 (Utah App. 1987). Findings will not disturbed unless they are clearly against the weight of the evidence or unless it manifestly appears that the court misapplied the law to established facts. Brown v. Board of Education of Morgan County School District, 560, P.2d 1129 (Utah 1977).

The heavy burden imposed upon an appellant has been cogently expressed by the Utah Supreme Court as follows:

> It is incumbent upon the appellant to marshall all of the evidence in support of the trial court's findings and demonstrate even when viewed in the light most favorable to the factual determinations made by the trial court, that the evidence is insufficient to support its finding.

Harline v. Campbell, 728 P.2d 980, 982 (Utah 1986). Accord, Scharf v. BMG Corporation, 700 P.2d 1068, 1070 (Utah 1985).

In this case, respondents are seeking to challenge the district court's factual findings and legal conclusions with respect to respondents Horwath, Gorbet, Krier and Boridin. In doing so, however, respondents have nowhere set forth the evidence upon which the district court based those determinations.

Thus, respondents have failed to even colorably marshall the facts and demonstrate that even when viewed in the light most favorable to their affirmance, they are clearly erroneous. There is, accordingly, no basis upon which those findings and conclusions can be challenged on appeal.

IV. RESPONDENTS HAVE COMPLETELY FAILED TO SHOW ANY EVIDENCE IN THE RECORD ESTABLISHING THEIR ACQUISITION OF A NEW "USUAL ABODE" ON THE DATE SERVICE OF PROCESS WAS EFFECTED, AS REQUIRED BY WASHINGTON LAW.

As the Church has demonstrated in its appellant's brief, an abode once acquired is presumed to continue until the person asserting a change from that abode shows that he has acquired a new permanent abode. (Appellant's Brief at 11-12); see also Northwestern and Pacific Hypotheek Bank v. Ridpath, 29 Wash. 687, 70 P.2d 139, 147 (1902). In their response to the Church's brief, respondents have completely ignored this vital, dispositive issue. Their decision to do so is understandable in light of the fact that although each member of the Schuckardt Group testified that after his purported departure from the Priory, he moved to reestablish the religious order in Northern California, there is absolutely no evidence as to precisely when that move occurred. See e.g., Tr. 39, 55, 84, 124, 125, 152, 153, and 158). Specifically, there is no evidence that as of the date the summonses and complaints were served -- June 8, 1984 -- any member of the Schuckardt Group had acquired a new "usual abode."

While the trial transcript reflects repeated references to this move, a careful review of those references discloses no indication that any member of the Schuckardt Group considered California or any other location his new usual abode as of June 8, 1984. Therefore, under the Ridpath principle -- that once established, an abode is presumed to continue until it is shown that a new permanent abode has been acquired -- respondents have utterly failed to discharge their burden. As such, the district court clearly erred in failing to make any findings as to what the new supposed abode was as of the date service was effected. The district court further erred in concluding that respondents' usual place of abode was anything other than the Priory -- the site at which they had continuously resided for the two to four years preceding service of process.

Accordingly, this Court should reverse the district court's findings that the Priory was not the usual place of abode of respondents Schuckardt, Jacobs and Belzak and enter judgment as a matter of law that substituted service on those respondents at the Priory was validly effected. On that basis, the Washington Judgment must be enforced.

CONCLUSION

For the reasons set forth above and in the Church's appellant's brief, this Court should (i) reverse the district court' judgment with respect to respondents, Schuckardt, Belzak and Jacobs, (ii) affirm the judgment with respect to

cross-appellants, Horwath, Krier, Gorbet and Boridin, and (iii) remand this case to the district court with instructions to enforce the Washington Judgment as a matter of law.

DATED this 29 day of June, 1989.

PARSONS, BEHLE & LATIMER

By: _____
John T. Anderson
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four copies of the foregoing APPELLANTS' REPLY AND CROSS-RESPONDENTS' BRIEF to the following on this 29 day of June, 1988:

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